IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1125 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ISHWARBHAI DHURLABHBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1125 of 1996
MR KG SHETH appointed advocate for appellant
MR UDAY BHATT APP for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE A.M.KAPADIA

Date of decision: 21/06/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE A.M.KAPADIA)

1. Instant appeal filed under Section 374 of the Code of Criminal Procedure ('the Code' for short) has been preferred by the appellant ('the accused' for short) through jail, against judgment and order dated November 30, 1996 of the learned Additional Sessions Judge, Surat, by which the accused has been convicted for the offence punishable under Section 302 of the Indian Penal Code ('IPC' for short) and has been sentenced to suffer imprisonment for life.

2. The accused was charged under Section 302 of the IPC for having committed the murder of his wife - Vasanti by pouring kerosene on her body and setting her ablaze, in his house, at 12 O' clock midnight on February 19, 1996.

3. The case of the prosecution, in brief, is that marriage of the accused with Vasanti took place about 4 years back. At the time of marriage, the accused was doing the work of diamond cutting, at Surat, therefore, Vasanti resided with him at Surat. Out of the wedlock, the accused has a son named Vishal, who was aged about 1 1/2 years at the relevant time. The parents of Vasanti also resided at Surat. According to the prosecution version, the accused was in the habit of consuming liquor and in this regard often quarrels took place between the accused and Vasanti and the accused used to beat her frequently. Inspite of this, she was not complaining about the same under the belief that in future one day the accused would improve himself.

3.1. On the fateful day, i.e., February 19, 1996, the accused alongwith Vasanti had gone to the beach, near Varachha Road, at Surat. The accused went away by leaving Vasanti saying that he would coming very soon. As the accused did not turn up, Vasanti had gone to her father's place which was situated at Baroda Prestige. Thereafter the accused came to Vasanti's father's place at about 10 PM and took her with him. On the way the accused gave her two slaps asking as to why she went to her father's house. The accused thereafter gave her abuses and instructed her to prepare food immediately and went away. He returned at about 12 O' clock midnight. At that time Vasanti was sleeping as she was tired. Thereupon the accused got excited and uttered abuses and brought the stove filled with kerosene and poured kerosene upon her and lit match-stick on her and set her ablaze. At that time as the victim Vasanti shouted, neighbours assembled there and put out the fire.

Thereafter she was made to lie in her house. She was burnt on her whole body. Thereafter early in the morning she was taken to her father's place in a rickshaw and leaving her there the accused went away. The victim went to her father's place and informed about the incident. The father and brother of the victim took her to New Civil Hospital for treatment. According to the prosecution version, the accused was in the habit of drinking liquor and on restraining him in this respect, the accused poured kerosene on the victim and lit match-stick on her and set her ablaze.

3.2. A complaint for the aforesaid incident was filed by the victim Vasanti before the P.I. of Varachha Police station during her treatment while she was in hospital. The said complaint was recorded by Arjunsinh Chhabhubha Dabhi, PSI, as narrated by the victim Vasanti. On the basis of the aforesaid complaint, an offence was registered against the accused and investigation was put into motion. Statements of various witnesses were recorded, Panchnama of the scene of offence was prepared, for recording dying declaration of the victim a message was sent to the Executive Magistrate and in pursuance of the message, the Executive Magistrate recorded the dying declaration after getting endorsement from the concerned doctor to the effect that the victim was in conscious state and could be able to give her statement. During the course of treatment, the victim succumbed to the injuries, therefore, inquest Panchnama was drawn. Her dead body was sent for autopsy. At the end of the investigation, an offence was divulged against the accused for commission of the offence punishable under section 302 of the IPC. After getting autopsy report, offence was registered against the accused for the offence punishable under Section 302 of the IPC. On committal, the charge was framed by the learned Additional Sessions Judge, Surat against the accused which was denied by him and claimed to be tried. Thereupon he was put to trial vide Sessions Case No. 154 of 1996.

3.3. To prove the culpability of the accused, the prosecution has examined seven witnesses in all. The prosecution has also produced documents upon which heavy reliance was placed.

3.4. At the end of the trial, the learned Additional Sessions Judge came to the conclusion that deceased Vasanti died an unnatural death because of the burn injuries which she had received. He also held that the deceased died a homicidal death. On the basis of the two

dying declarations, one in the form of complaint and another which was recorded by the Executive Magistrate, the learned trial Judge recorded a categorical finding that on the fateful day, i.e., February 19, 1996, the accused poured kerosene from the stove on the body of the deceased Vasanti and set her ablaze and, therefore, according to the learned Additional Sessions Judge, the charge framed against the accused for the commission of the crime of murder of his wife Vasanti has been duly proved. He, therefore, recorded the order of conviction and sentence to which reference is made earlier which has given rise to the present appeal.

4. Mr. K.G. Sheth, learned advocate who has been appointed by this Court to assist the accused has assailed the judgment and order which is impugned in this appeal by submitting that the evidence on record adduced by the prosecution is wholly untrustworthy and in the facts and circumstances of the case, the dying declarations of the deceased could not be relied upon. According to him, the message sent to the Executive Magistrate by the police contained all the details of the complaint and, therefore, prior to recording of the dying declaration, the Executive Magistrate got the idea as to what he should record. According to him, even at the time of recording of dying declaration, mother and brother of the victim were present and, therefore, possibility of tutoring by them cannot be ruled out and, therefore, the dying declaration recorded by the Executive Magistrate has become doubtful and no reliance can be placed upon such a doubtful dying declaration. So far as the complaint which is also in the form of a dying declaration, according to him, it also cannot be said to be a trustworthy evidence because the victim was brought to the hospital by her parents and when the complaint was recorded by the PSI they were very much present and, therefore, the victim Vasanti was not the author of the complaint. In that view of the matter, according to the learned advocate of the accused, no reliance can be placed upon the complaint which is in the form of dying declaration. If both the dying declarations are not reliable then there is absolutely nothing against the accused and, therefore, according to him, the order recording conviction and resultant sentence cannot be sustained and, therefore, deserves to be quashed and set aside by holding the appellant not guilty to the charge and thereby acquitting him. He, therefore, urged to allow the appeal.

5. Mr. Uday Bhatt, learned APP, supported the impugned judgment and order of conviction and sentence

recorded by the trial Judge. According to him, the learned Additional Sessions Judge has very rightly relied upon the two dying declarations which are independent. The first dying declaration was recorded by the PSI in the hospital wherein the victim had given details about the incident. The second dying declaration which was recorded by the Executive Magistrate is also in consonance with the first dying declaration wherein also the victim had given details as to how the incident had taken place. Therefore, both the dying declarations corroborate each other. Besides this, according to the learned APP, there is ample evidence on record to show that the accused was in the habit of drinking liquor every day and as a result thereof frequently quarrel took place between the accused and the victim. On the day of the incident also the accused had beaten her and asked her to prepare food immediately. As she did not prepare the food the accused got excited and poured kerosene upon her and set her ablaze. According to the learned APP, since there is ample evidence against the accused to establish the commission of offence of murder of his wife, it will not be proper for this court to interfere with the impugned judgment and order of conviction recorded by the trial court and he, therefore, urged to dismiss the appeal.

6. We have considered the submissions advanced by the learned advocates appearing for both parties. We have considered the oral as well as documentary evidence on record and the reported decision of the Supreme Court interpreting Section 32 of the Indian Evidence Act as to how evidence in the form of dying declaration should be appreciated.

7. There is no dispute even by the defence that the deceased died an unnatural death. The question is whether she died a suicidal death or homicidal death. So far as the evidence in this regard is concerned, the prosecution has mainly relied upon two sets of dying declarations. One is in the form of complaint which was recorded by PSI Arjunsinh Dabhi in the hospital. To prove the said dying declaration, the prosecution has examined Arjunsinh Dabhi as prosecution witness No.6 at Ex.16. He inter alia testified that he received information from the hospital that Vasanti had received burn injuries and, therefore, he rushed to the hospital and started inquiring her as to what had happened. He recorded the complaint as per the narration of the victim Vasanti. The said complaint is exhibited as EX.17. In the said complaint he has given details as to how the incident had taken place and she has categorically stated

that her husband brought stove filled with kerosene and he poured kerosene upon her and thereafter set her ablaze. During the cross-examination he denied the suggestion made by the defence that the complaint was given by the mother of Vasanti. He also denied that Vasanti was in an unconscious condition and she was not able to speak. It may be noted that he successfully withstood the test of cross-examination and nothing substantial could be brought out from his cross-examination which could be of any help to the defence. Therefore, according to us, the dying declaration which is in the form of a complaint which is produced at Ex.17 is duly proved as it is trustworthy and therefore reliance can be placed upon it.

8. Now the next dying declaration is the one which was recorded by the Executive Magistrate. In this connection, the prosecution has examined Dineshchandra Nathubhai Intwala, P.W.2 at Ex.9. During his examination-in-chief he inter alia testified that on February 20, 1996 when he was on duty and at about 4.15 P.M. through the Varachha Police he received a yadi calling upon him to record dying declaration of Vasantiben. On receipt of the said yadi he immediately went to New Civil Hospital and met Vasantiben who was in the female burn ward. He introduced himself to her as Executive Magistrate and thereafter recorded the statement as narrated by the victim as per the reply given by her. He himself has verified that the patient was fully conscious. He has produced police yadi at Ex.10 and the dying declaration at Ex.11. During his cross-examination, a suggestion was put by the defence that Vasanti was unconscious which he has denied. He has also denied the suggestion that Vasanti's maternal uncle has signed on the said dying declaration. Now on having perusal of Ex.10 which is a police yadi it can be seen that there is an endorsement made by the doctor at 2 P.M. that the patient is conscious. So far as Ex.11 is concerned, it is in question and answer form. Therefore it can be deduced that the dying declaration recorded by the Executive Magistrate is also independent one without any interference of any family members of the victim. The presence of the family members while recording the dying declaration by itself cannot be a ground to discard that piece of evidence.

9. The law on appreciation of evidence of dying declaration is now well settled by catena of decision of the Supreme Court. The Supreme Court in Smt. Paniben v. State of Gujarat, AIR 1992 SC 1817 has laid down the principles governing dying declarations by referring to

several judgments which can be summed up as under:

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Mannu Raja v. State of U.P., [1976] 2 SCR 764: AIR 1976 SC 2199.

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of U. P. v. Ram Sagar Yadav, AIR 1985 SC 416; Ramavati Devi v. State of Bihar, AIR 1983 SC 164).

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (Ram Chandra Reddy v. Public Prosecutor, AIR 1976 S.C. 1994).

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. Sate of Madhya Pradesh, [1974] 4 S.C.C. 264: (AIR 1974 SC 332).

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M. P., AIR 1982 S.C. 1021).

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P. 1981 SCC (Crl.) 581).

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurthi Laxmipati Naidu, AIR 1981 SC 617).

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Oza v. State of Bihar, AIR 1979 SC 1505).

(ix) Normally the court in order to satisfy

whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram v. State, AIR 1988 SC 912).

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan, AIR 1989 S.C. 1519).

Applying the principles laid down by the Supreme Court in the above referred to judgment in the case of Smt. Paniben's case (supra) wherein previous judgments of the Supreme Court have been quoted deciding the law on appreciation of evidence of dying declaration to the facts of the present case, we are of the confirmed opinion that in the instant case also two dying declarations of the deceased were recorded one by the police officer and another by the Executive Magistrate and they are independent, trustworthy and satisfied the test of dying declaration and, therefore, reliance can be placed upon them and the learned trial Judge has very rightly relied upon the two dying declarations and convicted and sentenced the accused.

10. The contention that the incident took place on the spur of moment by way of sudden and grave provocation given by the deceased to the accused and therefore the offence under Section 302 of IPC is not established has no substance. It has come in evidence that while the incident had taken place the victim Vasanti was sleeping on her bed and the accused came there and on seeing her sleeping, he excited, abused her, then immediately brought stove filled with kerosene, poured kerosene upon her and set her ablaze. Therefore, it cannot be said that the incident has taken place on a spur of moment and because of the sudden and grave provocation given by the deceased.

11. We are in complete agreement with the finding recorded and the ultimate conclusion arrived at by the learned trial Judge for convicting the accused and according to us no other view is possible except the view taken by the learned trial Judge.

12. No new argument is advanced. No new criticism is offered. No infirmity in the reasoning of the learned

trial Judge is pointed out. The evidence has been carefully analysed and fully appreciated in the closely reasoned judgment with which we fully concur. We do not think it right to invest public time in reiterating the same reasoning in our language or giving the same answers to the same criticism in our own words for the sake of form.

13. In the aforesaid view of the matter, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence passed by the learned trial Judge.

14. In the wake up of the aforesaid, we are not inclined to interfere with the impugned judgment and order of conviction and sentence recorded by the learned Additional Sessions Judge and hence the appeal lacks merit and deserves to be dismissed and thereby the order of conviction and sentence deserves to be upheld.

15. For the foregoing reasons, the appeal fails and accordingly it is dismissed.

(A.R. Dave, J.)

(A.M. Kapadia, J.)

(karan)